No. 85-601

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PALMORE CURREY, II,

Petitioner,

vs.

FRIEDRICH WILHELM WAFFENSCHMIDT, ANNA WAFFENSCHMIDT and SUNBURST FARMS, INC.,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Was the Court of Appeals correct in affirming the district court's assertion of jurisdiction to hold a nonresident third party in contempt for knowingly aiding a defendant's contemptuous violation of the district court's injunctive orders?

PARTIES INVOLVED

The plaintiffs in this action are Friedrich Wilhelm Waffenschmidt ("Fritz"), Anna Waffenschmidt ("Anna") and Sunburst Farms, Inc. ("SFI").

One of the original defendants in this action is Jack W. MacKay, Jr. ("Mackay"). The United States District Court for the Northern District of Mississippi, Eastern Division, by Judge William C. Keady, on August 12, 1983 held MacKay in civil contempt and jailed him to compel compliance with its orders. The district court relased MacKay on November 10, 1983 when it concluded that incarceration had become punitive, though the contempt had not been purged.

Thereafter, on December 9, 1983 the district court held third party respondents Palmore Currey, II ("Currey"), Kendall Johnson ("Johnson") and his company D&K Motor Sports, Inc. ("D&K") in civil contempt for aiding MacKay's contempt. The district court declined to hold third party respondent The First National Bank of Mount Vernon, Texas (the "Bank") in civil contempt, although it found that the Bank had aided Mackay negligently, but in good faith.

Currey, Johnson and D&K appealed to the Fifth Circuit Court of Appeals, and the plaintiffs cross-appealed against the Bank. The Fifth Circuit affirmed the district court.

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PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived* of life, *liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

(Emphasis added.)

Rule 65(d) of the Federal Rules of Civil Procedure states:

> *Every order granting an injunction and every restraining order* shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and *is binding only upon the parties* to the action, *their* officers, *agents*, servants, employees, and attorneys, *and upon those persons in active concert or participation with them who receive actual notice* of the order *by personal service or otherwise.*

(Emphasis added.)

STATEMENT OF THE CASE

This action[1] was brought on March 9, 1983 in the United States District Court for the Northern District of Mississippi, Eastern Division, to redress a massive and elaborate fraud perpetrated upon Fritz and his wife Anna (together the "Waffenschmidts") by, among others, MacKay and the Waffenschmidts' investment advisors and attorneys, in connection with the Waffenschmidts' purchase of the stock of SFI, the principal asset of which was a farm near Columbus, Mississippi. The fraud centered around misrepresentations that the farm had made increasing annual net profits from about $600,000 in 1976 to about $1,200,000 in 1981, when in actual fact the farm had lost money (twice the losses exceeded $500,000) in each of those years.

On plaintiffs' motion for a preliminary injunction, the district court held that plaintiffs had demonstrated "a substantial, if not overwhelming, likelihood of success on the merits." (R. 96.) While Currey's, Johnson's and D&K's appeal to the Fifth Circuit was pending, on October 17, 1984 the Waffenschmidts and SFI obtained a jury verdict against MacKay for $8,084,681 based on federal and state securities violations, RICO, common law fraud, breach of contract and conversion. The verdict was reduced to a judgment of $5,084,681 to account for prior settlements with other named defendants.

The Temporary Restraining Order

Shortly after the commencement of the action, on March 16, 1983 the plaintiffs obtained a temporary restraining order (the

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[1] Among other things, the complaint asserted violations of section 12 of the Securities Act of 1933 (15 U.S.C. §77*l*), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5), corresponding sections of the Mississippi Blue Sky statute (sections 75-71-401, 75-71-501, 75-71-717 and 75-71-719 of the Mississippi Code Annotated), section 901(a) of the Racketeer Influenced and Corrupt Organizations Act of 1970 (18 U.S.C. §1961, *et seq.*) ("RICO"), common law fraud, breach of contract and conversion. (R. 1-85.)

"TRO") against MacKay and others enjoining them, "and all persons acting in concert with them," from, among other things, transferring, concealing or disposing of any funds, or proceeds therefrom, received from the Waffenschmidts. (R. 87.) The TRO was extended through May 24, 1983 by agreement among the parties and order of the district court (R. 90-91) and through the evidentiary hearing on plaintiffs' motion for a preliminary injunction by order of the district court (R. 92-93).

The Preliminary Injunction

Following a four-day evidentiary hearing, the district court granted an Order of Preliminary Injunction dated May 27, 1983 (the "PI") against MacKay and another, "their agents, designees, representatives or other persons acting in concert with them," among other things, prohibiting any acts forbidden by the TRO or the transfer of real or personal property acquired since March 19, 1982, and directing them to "pay over and deliver" all such assets other than real property to the clerk of the district court "to assure that if the plaintiff Waffenschmidts prevail ... assets ... will be available to satisfy such judgment." (R. 94-103, 113-114.)

The Order Of Contempt Against MacKay

On June 23, 1983 the plaintiffs moved for an order requiring MacKay to show cause why he should not be held in contempt for violating the TRO and the PI. (R. 104, 116.) Following evidentiary hearings on July 1 and 15, 1983 the district court entered an Order of Contempt dated August 12, 1983 (R. 104-108) finding:

> MacKay made prohibited transfers and caused and permitted encumbrances to be placed on the proceeds of the fraud practiced upon plaintiffs [1] [A] on March 17, 1983 ($100,000), [B] April 15, 1983 ($15,000), [C] April 28, 1983 ($15,000), [D] May 4, 1983 ($100,000) at the ... Bank ..., [2] $100,000 to Palmore Currey, and [3] $100,000 to Kendall Johnson and/or D&K Motor Sports, Inc. ...

(R. 105.)

The district court ordered MacKay incarcerated until he paid into the court the $430,000 or its equivalent, plus certain additional money. (R. 106-107.) After MacKay spent 80 days in jail without paying a penny, the district court released him finding that, while his contempt had not been purged, continued incarceration would be punitive. (R. 109-110.) The plaintiffs then brought contempt proceedings against MacKay's alleged Texas accomplices – Currey, Johnson, D&K and the Bank – to attempt to recover these funds. (R. 111-335, 418-420.)

The Judgment Against Currey, Johnson And D&K

On December 2, 1983, the district court held an evidentiary hearing at which MacKay, Currey, Johnson and the president of the Bank testified. On December 9, 1983, the district court issued a written memorandum (R. 451-468) and orders (R. 469-472) holding Currey, Johnson and D&K in civil contempt for violating the TRO, PI and Order of Contempt, but exonerating the Bank. The district court imposed a compensatory fine against Currey of $103,500, plus attorneys' fees of $6,840.09 (R. 469-470, 539-540). This judgment was affirmed by the Fifth Circuit Court of Appeals, and Currey now seeks a writ of certiorari from this Court.

Plaintiffs' proof before the district court clearly and convincingly demonstrated that Currey was "in cahoots" with MacKay to violate the TRO, PI and Order of Contempt.

Currey's T-Note Was Proceeds From
The Fraud Upon The Waffenschmidts

The underlying fraud was perpetrated through a two-step transaction: the Waffenschmidts (1) purchased 55% of the stock of SFI for $3.3 million in cash paid March 19, 1982 and (2) purchased the remaining 45% of the stock of SFI for approximately $2.4 million in cash paid June 4, 1982. Of the approximately $2.4 million paid June 4, 1982, $1,792,547.34 was paid to MacKay and deposited to his account at the Merchants and Farmers Bank in Columbus, Mississippi. On June 7, 1982 MacKay wire-transferred $1 million of this money from the Merchants and

Farmers Bank to the Bank in Texas. (Tr.[2] 17, 23; R. 447.) MacKay then used these funds in Texas to buy certificates of deposit at various local Texas banks. (Tr. 17, 166-67, 170; R. 447.)

The certificates of deposit came due on September 1, 1982, at which time MacKay had the Bank wire-transfer one-half of the proceeds to the Central Bank of Birmingham to buy a single $500,000 United States Treasury Note ("T-Note"). (Tr. 19.)

On February 24, 1983 MacKay sold this $500,000 T-Note for a $43,000 profit and used the balance to purchase from the Central Bank of Birmingham five separate $100,000 T-Notes maturing November 15, 1983, each with two $3,500 coupons attached, one due May 15, 1983 and one due November 15, 1983. (Tr. 19-20; Ex.[3] 360.) As confirmed by certified mail receipts, these five T-Notes and coupons were not physically delivered to MacKay in Texas until March 18, 1983 (R. 571-572, 583), two days *after* the entry of the TRO prohibiting MacKay and his agents from transferring, encumbering or concealing the proceeds of the fraud upon the Waffenschmidts (R. 87).

Currey's Transparently False Story

Currey has told an incredible story about his acquisition from MacKay of one of the $100,000 T-Notes with one $3,500 coupon due November 15, 1983 based upon an oral understanding. The district court justifiably found Currey's story to be "fictitious and did not occur as narrated by Currey" (R. 456), which finding the Fifth Circuit affirmed.

Currey's story was that he had an alleged oral agreement with MacKay for MacKay to purchase the Holiday Inn in Mount Pleasant, Texas from Western Interests Corporation, a Texas corporation owned and controlled by Currey and his wife and children;

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[2] References designated "Tr." are to the transcript of the proceedings before the district court held on December 2, 1983 which is part of the Record on Appeal.

[3] References designated "Ex." are to exhibits admitted into evidence at the hearing before the district court on December 2, 1983 which are part of the Record on Appeal.

that MacKay delivered the T-Note and coupon to Currey sometime during the first ten days of March 1983[4] as escrow money for the purchase of the Holiday Inn, and that the T-Note and coupon were forfeited June 1, 1983 when MacKay purportedly failed to produce the balance of the purchase price of $2.6 million. (Tr. 64-65, 69; Currey dep.[5] 7-9.)

The Circumstances Demonstrating Currey's Story Is Untrue

However, Currey's testimony at the hearing and during his deposition demonstrates, as the district court found (R. 454-455), that Currey's story is fiction. Currey testified that there were no witnesses to this oral agreement other than MacKay and himself (Tr. 63); that there was no document, not even a letter, that in any way confirmed or corroborated the terms of this agreement (Currey dep. 9; Tr. 63); that he told no one else about the alleged agreement, not even his wife or children who were shareholders in the corporation that owned the Holiday Inn and were active in the business (Currey dep. 7, 17; Tr. 54-55, 59-61, 66-67); that he did not tell his banker about the agreement even though the bank was financing a substantial renovation of the hotel (Tr. 54, 83); that the structure of the alleged deal was never finalized, especially the cash to be paid by MacKay and whether MacKay was going to assume promissory notes held by Currey's relatives (Tr. 65-66; Currey dep. 19-20); that he had never dealt this way before, although he had previously sold a Holiday Inn in Paris, Texas for which he engaged a lawyer who drew a written contract (Tr. 61-63); that he did not know anything about MacKay's business (Currey dep. 27); that he did not do anything

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[4] The records of the Central Bank of Birmingham show that the T-Note with two coupons were mailed to MacKay in Texas and were received by his father Jack W. MacKay, Sr. on March 18, 1983 (R. 571-572, 583). This conclusively demonstrates that Currey was lying when he testified that he received the T-Note during the first ten days of March 1983.

[5] References designated "Currey dep." are to the transcript of Currey's deposition taken July 12, 1983 admitted into evidence at the hearing before the district court on December 2, 1983, which is part of the Record on Appeal.

to investigate MacKay's background or even ask him for a financial statement (Currey dep. 26; Tr. 70); and that MacKay did not even ask for an extension when the alleged June 1, 1983 forefeiture date arrived (Tr. 68).[6]

Thus the district court which saw Currey testify and had a full opportunity to assess his demeanor unquestionably was correct in finding:

> Currey's claim that he is entitled to the $103,500 as forfeit money for the failure of MacKay to perform by June, 1983 an oral agreement to purchase the Mount Pleasant Holiday Inn for $2,700,000 is incredible and not worthy of belief.

(R. 454.)

The Liquidation Of The T-Note And Coupon In Violation Of The District Court's Orders

Currey's testimony as to his subsequent liquidation of the T-Note and coupon demonstrates a cavalier disregard for the orders of the district court that justified holding him in contempt for acting in concert with, and as an agent for, MacKay to conceal the proceeds of the fraud.

Currey acknowledged that he had received, or had been aware through his attorney of the contents of, the TRO, PI and the Order of Contempt *before* he cashed the T-Note and coupon.[7] (Tr. 40,

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[6] The T-Note which Currey obtained from MacKay originally had two coupons attached—one due May 15, 1983 and one due November 15, 1983. The T-Note Currey had at the time of his deposition (Ex. 360) had only the November 15, 1983 coupon attached. It is a strong inference that Currey did not receive the T-Note until after May 15, 1983, and probably not until his June 1983 meeting with MacKay, which occurred after the entry of the PI. In fact, MacKay used the May 15, 1983 coupon, and others, contumaciously to borrow $15,000 from the Bank on April 15, 1983. (R. 105, 233; Tr. 194-195, 199, 201; Ex. 342.)

[7] Currey strangely had difficulty establishing the date he cashed the T-Note and coupon. At first, on November 30, 1983 his counsel served and filed an unsigned affidavit stating Currey still held the T-Note and coupon. (R. 428; Ex. 662.)

(footnote continued)

53-54.) Currey admitted on the witness stand that he had been informed by the Waffenschmidts' counsel that the T-Note and coupon were part of the proceeds of the fraud and that he was to deliver them to the Mississippi district court. (Tr. 29-30, 32, 36-37; R. 380-381, 383, 385-386.)

Instead, Currey ignored this direction and liquidated[8] the T-Note and coupon, which he conceded represented "an extraordinary amount of money" (Tr. 41-42). Yet, Currey did not recall the name of the person or the name of the company (perhaps Silver Smelters, Inc.) with which he dealt to liquidate this T-Note and coupon. (Tr. 42-43.) As to his specific purpose for liquidating the T-Note and coupon (prior to its maturity), he testified, "I was going to buy silver with it and changed my mind" (Tr. 48), and then claimed he needed the money to pay for renovations of the Holiday Inn (Tr. 54), for which he had arranged bank financing in June 1983 (Tr. 83).

Thus, the only conclusion from this testimony and the other facts presented, as the district court properly found and the Fifth Circuit correctly affirmed, is that Currey received from MacKay and cashed the $100,000 T-Note and $3,500 coupon "for the purpose of aiding and abetting a plan or scheme to violate the Court's injunctive orders issued before delivery of the treasury note and coupon." (R. 456.)

At the hearing, Currey produced a different signed affidavit stating he cashed the T-Note and coupon on October 1, 1983. (R. 433; Tr. 44-46; Ex. 661.) However, on the stand on December 2, 1983 Currey could not recall if he cashed the T-Note or coupon on October 1, 1983 or within thirty days of that date. (Tr. 41, 47-48.)

[8] However, Currey produced no documentation to support his claim that he had liquidated the T-Note.

SUMMARY OF THE ARGUMENT

Currey's petition for a writ of certiorari challenges basic assumptions about the powers of a federal court, and, if successful, would dramatically reduce the power of federal courts to enforce their orders.

It has long been established that:

(1) A federal court sits as a court of equity when issuing an injunction. See, *e.g.*, *Gompers v. Buck's Stove & Range Company*, 221 U.S. 418, 441, 31 S. Ct. 492, 498 (1911).

(2) The mandate of an injunction runs nationwide. See *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451, 52 S. Ct. 238, 240 (1932).

(3) An injunction binds not only the parties who violate it, but also those who aid and abet parties in violating the injunction. See *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 14, 65 S. Ct. 478, 481 (1945).

(4) Only the court which entered the injunction may enforce it through contempt. See *In re Debs*, 158 U.S. 564, 594-595, 15 S. Ct. 900, 910 (1895).

The Fifth Circuit, the district court and respondents here say these principles allowed the Mississippi district court to hold Currey in contempt for knowingly aiding MacKay in violating the TRO, PI and Order of Contempt.

Currey argues that only a court of law sitting in his home state of Texas through a trial by jury[9] could determine whether he aided MacKay in a violation of a Mississippi federal court's injunction. (Currey's Petition at 8-9.) In effect, Currey argues that each of

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[9] This Court in *Shillitani v. United States*, 384 U.S. 364, 365, 86 S. Ct. 1531, 1533 (1966), disposed of Currey's argument on this point in holding that, in "a civil contempt proceeding, ... indictment and jury trial are not constitutionally required."

the four propositions listed above is incorrect. Clearly, Currey's petition has no merit and should be denied.

Currey also attacks the Fifth Circuit's alternative holding that the Mississippi district court could have exercised jurisdiction over him under Mississippi's long-arm statute. However, Currey ignores the fact that his actions in Texas had foreseeable effects in Mississippi, which would justify asserting jurisdiction over him. See *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir. 1982).

In addition, as the above factual recitation demonstrates, Currey raises a non-issue (Currey's Petition at 10-11) with respect to *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952), and *Nishikawa v. Dulles*, 356 U.S. 129, 78 S. Ct. 612 (1958). *Nishikawa* does not stand for the rule "that on appellate review, the witness' testimony is to be disregarded" (Currey's Petition at 10), and there was more than ample evidence demonstrating that Currey violated the district court's orders. Currey received the T-Note from MacKay after the TRO was issued. He had no valid or believable explanation as to how he came to have it. In the face of having been served with the TRO, the PI and the Order of Contempt, Currey claimed he thereafter disposed of the T-Note and kept the proceeds, clearly violating the district court's orders.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE FEDERAL DISTRICT COURT HAD INHERENT POWER TO HOLD CURREY IN CONTEMPT AS A THIRD PARTY KNOWINGLY AIDING A PARTY IN VIOLATING INJUNCTIVE ORDERS.

"[A] decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence ... defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 14, 65 S. Ct. 478, 481 (1945).

> It has been settled law for a long time that one who knowingly aids, abets, assists, or acts in active concert with, a person who has been enjoined in violating an injunction subjects himself to civil as well as criminal proceedings for contempt even though he was not named or served with process in the suit in which the injunction was issued or even served with a copy of the injunction. In re Lennon, 1897, 166 U.S. 548, 554, 17 S.Ct. 658, 41 L.Ed. 1110; Alemite Mfg. Corp. v. Staff, 2 Cir., 1930, 42 F.2d 832 and cases cited.

Reich v. United States, 239 F.2d 134, 137 (1st Cir. 1956), *cert. denied*, 352 U.S. 1004, 77 S. Ct. 563 (1957).

This common-law doctrine is embodied in Rule 65(d) of the Federal Rules of Civil Procedure, *United States v. Hall*, 472 F.2d 261, 267 (5th Cir. 1972), which states, in relevant part, that "[e]very ... restraining order ... is binding ... upon those persons in active concert or participation."

The mandate of an injunction runs nationwide, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451, 52 S. Ct. 238, 240 (1932), and a "[v]iolation of an injunctive order is cognizable

[only] in the court which issued the injunction, regardless of where the violation occurred," *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963). Enforcement of an injunction through a contempt proceeding must be pursued in the issuing jurisdiction because "[c]ontempt has traditionally been viewed as an affront to the court issuing the order," *Bedgood v. Cleland*, 554 F. Supp. 513, 517 (D. Minn. 1982). Thus, regardless of where Currey resides, only the Mississippi district court had the "power to punish for a disobedience of [its] order[s]," *In re Debs*, 158 U.S. 564, 594, 15 S. Ct. 900, 910 (1895).[10]

Pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, and the common law doctrine from which it is derived, for the district court to adjudicate Currey in contempt of its orders, it was required to find that (1) he had actual notice of the orders said to be violated and (2) he had participated with MacKay in MacKay's contumacious conduct. See *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 112, 89 S. Ct. 1562, 1570 (1969); *Alemite Mfg. Corporation v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930); 11 Wright & Miller, *Federal Practice and Procedure*, §2965 (1973) at 563.

As described above, Currey admits to having notice of the TRO and PI on July 12, 1983 and of the Order of Contempt by September 2, 1983. Currey further admits that he was notified that the T-Note and coupon had been found by the district court to be proceeds from the fraud perpetrated upon the Waffenschmidts and were to be transferred to the clerk of the Mississippi district court as security for the judgment to be obtained by the Waffenschmidts. Nonetheless, Currey knowingly violated the TRO, PI and Order of Contempt in approximately October 1983 when he refused to transfer the T-Note and coupon to the clerk of the district court, but negotiated them and used the proceeds from that sale in some unknown manner.

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[10] Further, an injunction of a federal court cannot be enforced outside the court which issued it. An injunction is not registrable and enforceable in another court pursuant to United States Judicial Code §1963 (28 U.S.C. §1963). See *Stiller v. Hardman, supra; Bedgood v. Cleland, supra.*

In addition, in light of the uncontradicted documentary facts that MacKay did not receive the T-Note and coupon until after the entry of the TRO and Currey's T-Note was missing the May 15, 1983, but not the November 15, 1983, coupon, the district court was clearly justified in concluding that Currey's whole story about the initial transfer of the T-Note and coupon from MacKay before March 10, 1983 was a total fabrication and that therefore Currey was acting as MacKay's agent in receiving and secreting the proceeds from the fraud upon the Waffenschmidts. Thus, the two prerequisites to hold Currey accountable in the Mississippi district court – actual notice and assistance to MacKay – had been met.

Further, this dual requirement of actual notice plus actions which aid violations of the federal district court's orders, as held by the Fifth Circuit (see that portion of the Fifth Circuit's opinion reprinted in Currey's Petition at 5a-6a, 16a-18a), is sufficient to satisfy the constitutional requirement of due process of law under the *Fifth Amendment*.[a]

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[a] Currey's petition confuses the due process requirements under the Fourteenth Amendment as applied to state courts asserting jurisdiction over nonresidents, see *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), with the due process requirements under the Fifth Amendment applied to a federal district court sitting in equity whose jurisdiction is nationwide.

> One fundamental principle of the Anglo-American law of jurisdiction is that a sovereignty has personal jurisdiction over any defendant within its territorial limits, and that it may exercise that jurisdiction by any of its courts able to obtain service upon the defendant. This principle has long been applied to the states under the due process clause of the Fourteenth Amendment.* * *
>
> What has frequently been overlooked is that this same basic principle has long been applied to the United States itself, so that the United States is deemed to have personal jurisdiction over any defendant within the United States. (Toland v. Sprague, 12 Pet. 300, 37 U.S. 300, 9 L.Ed. 1093; United States v. Union Pacific R. Co., 98 U.S. 569, 25 L.Ed. 143; Robertson v. Railroad Labor Board, 268 U.S. 619, 45 S.Ct. 621, 69 L.Ed. 1119; Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185.) Because of this oversight, and by analogy to the application of the basic

(footnote continued)

The Fifth Circuit found:

(1) Currey by knowingly violating the district court's orders could reasonably anticipate having to justify his actions to the Mississippi district court.

(2) Currey's inconvenience in litigating in a distant forum resulted from his own actions in violating the court's orders and was far outweighed by the inconvenience to the plaintiffs in having to commence plenary actions wherever the enjoined party and his agents chose to secrete funds and the heavy burden upon the judicial system by repetitious proceedings where the second court would have to retry the evidence leading to the injunctive orders.

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principle to the states, there is a line of cases apparently denying the validity of an exercise of personal jurisdiction by a federal court over a defendant present within the United States unless the defendant is also present (or "doing business," etc.) within the district in which the court is held. In other words, the restrictions of the Fourteenth Amendment upon state jurisdiction have been applied by these cases to federal jurisdiction. The anomaly here lies not only in overlooking the principle that the United States may exercise personal jurisdiction over any defendant within the United States, but also in limiting federal action by a constitutional provision applicable only to state action.

First Flight Company v. National Carloading Corporation, 209 F. Supp. 730, 736-737 (E.D. Tenn. 1962) (footnotes omitted except for portion of one footnote inserted in the first parentheses).

Rules 4(f) and 65(d) of the Federal Rules of Civil Procedure codify the nationwide jurisdiction of federal courts to enforce their orders. In addition, in this action, plaintiffs invoked the jurisdiction of the federal district court through section 22(a) the Securities Act of 1933 (15 U.S.C. §77v(a)) and section 27 of the Securities Exchange Act of 1934 (15 U.S.C. §78aa), each of which provides for nationwide service of process, even for pendent claims, see *Robinson v. Penn Central Company*, 484 F.2d 553, 556 (3d Cir. 1973).

(3) The Mississippi district court had a strong special interest in litigating the matter before it due to its "manifest need ... to protect and enforce its own judgments".[12]

These considerations clearly demonstrate that Fifth Amendment due process of law was not offended by the assertion of jurisdiction over Currey in the Mississippi federal district court.

Moreover, if Currey's argument were correct, federal injunctions would be almost meaningless pieces of paper. If a party enjoined in Mississippi were to retain an agent, such as a lawyer, across the state line in Louisiana, who does exactly what the enjoined defendant was prohibited from doing by a Mississippi district court, according to Currey, the Mississippi federal court would have no recourse against the nonparty Louisiana lawyer for the out-of-state defiance of its injunction. This is not, and never has been, the law.

II. THE FIFTH CIRCUIT'S ALTERNATIVE HOLDING THAT THERE WAS JURISDICTION OVER CURREY UNDER THE MISSISSIPPI LONG-ARM STATUTE IS ALSO CORRECT.

Currey's argument in this portion of his petition (at 12-14) appears to be that, because he took no actions in Mississippi, he may not be subject to Mississippi's long-arm statute. Currey ignores the following statement of Mississippi law by the Fifth Circuit (reprinted at 15a):

> Mississippi allows for service on nonresidents who commit acts outside the state with foreseeable effects resulting within the forum. *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir. 1982), *cited with approval in, First Mississippi National Bank v. S & K Enterprises of Jackson, Inc.*, 460 So. 2d 839, 843 (Miss. 1984).

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[12] Indeed, under the All Writs Act (28 U.S.C. §1651(a)), federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Once Currey had knowledge of the Mississippi district court's orders, every action he took in derogation of those orders had the foreseeable consequence of causing damage in Mississippi for which Currey would have to answer to the Mississippi court. "An order imposing a compensatory fine in a civil contempt proceeding is thus somewhat analogous to a tort judgment for damages caused by wrongful conduct," *Parker v. United States*, 153 F.2d 66, 70 (1st Cir. 1946), and it was therefore appropriate to uphold jurisdiction over Currey under the Mississippi long-arm statute.[13] See that portion of the Fifth Circuit's opinion reprinted in Currey's Petition at 18a-21a.

III. THERE WAS AMPLE EVIDENCE TO SUPPORT THE DISTRICT COURT'S JUDGMENT AGAINST CURREY.

Currey argues that there is a "rule" from *Nishikawa v. Dulles*, *356 U.S. 129, 78 S.Ct. 612 (1958)*, that, where there is a question of a witness' demeanor, "on appellate review, the witness' testimony is to be disregarded" (Currey's Petition at 10). Applying this "rule", Currey then argues that there is no evidence of his contempt. Not only is there no such "rule" from *Nishikawa*, but there is more than adequate evidence of Currey's contempt.

In *Nishikawa*, the issue was who had the burden of persuasion that an act of renunciation of citizenship was voluntarily performed. 356 U.S. at 133-134, 78 S.Ct. at 615-616. This Court held that it was the government's burden, and that it had not been met. 356 U.S. at 134, 137, 78 S.Ct. at 616, 617. In reaching this conclusion, this Court held only that "the district judge's disbelief of petitioner's story of his motives and fears [cannot] fill the evidentiary gap in the Government's case." 356 U.S. at 137, 78 S.Ct. at 617.

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[13] Currey's argument in footnote 15 that Rule 4(f) of the Federal Rules of Civil Procedure limits a federal court's civil contempt power to out-of-state locations within 100 miles of the courthouse was convincingly answered by the Fifth Circuit. See that portion of the Fifth Circuit's opinion reprinted in Currey's Petition at 13a-14a.

As described above, here there is documentary evidence that Currey, contrary to his testimony, could not have received the T-Note until after the entry of the TRO. Further, the T-Note itself only had attached the November 15, 1983 coupon and not the May 15, 1983 coupon when Currey received it from MacKay. This gives rise to a strong inference that Currey did not receive the T-Note from MacKay until after the entry of the PI. Further circumstantial support for this conclusion is that on April 15, 1983, MacKay (in violation of the TRO) pledged to the Bank five coupons to secure a loan of $15,000 due May 15, 1983. Thus, it appears that MacKay removed the coupons in April to secure a loan of $15,000 and, in June 1983 after the district court issued the PI, delivered the T-Note with its one remaining coupon to Currey for him to hold.

Moreover, there was evidence admitted by Currey that he received notice of the TRO and PI on July 12, 1983 at a time when he still held the T-Note and the coupon and that he was advised orally, in writing and in detail that the T-Note and coupon were proceeds from the fraud upon the Waffenschmidts, subject to the district court's orders, which proceeds were required to be deposited with the clerk of the Mississippi district court. Notwithstanding that knowledge, Currey further secreted and dissipated the proceeds from the T-Note and coupon in violation of those orders and the Order of Contempt.

When these facts are added to Currey's transparently false story as to how and when he came to hold the T-Note and coupon, the district court clearly was justified in finding "that Currey received the $100,000 treasury note and coupon from MacKay for the purpose of aiding and abetting a plan or scheme to violate the Court's injunctive orders". Reprinted in Currey's Petition at 35a.

CONCLUSION

For all the reasons stated above, this Court should deny Currey's petition for a writ of certiorari.

Dated: New York, New York
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were forwarded on November 4, 1985 by Federal Express, charges prepaid, to Mr. James Robertshaw, Esq., Robertshaw, Terney & Noble, 128 South Poplar Street, Greenville, Mississippi 38702, counsel for petitioner.

/s/

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